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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION AND BRIEF OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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33 pp

QUESTIONS PRESENTED

1. Whether an owner of damaged cargo can be deprived of his rights under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1988), and be forced to resolve his claims through arbitration in a remote jurisdiction, bearing no reasonable connection to the transaction, when:

   a) The cargo owner had no notice of the foreign arbitration clause before receipt of the damaged goods; and

   b) The cargo owner had no opportunity to negotiate the terms of the foreign arbitration clause denying those rights guaranteed by COGSA?

2. Whether repeal of a cargo owner's statutory protections under COGSA may be implied from the mere recodification of a preexisting statute?

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STATEMENT OF INTEREST OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AND MOTION FOR LEAVE TO INTERVENE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The American Association of Exporters and Importers ("AAEI") and the American Institute of Marine Underwriters ("AIMU") hereby request permission to file a brief *amicus curiae* in the above matter. Consent of all parties has been duly requested. Petitioner has consented to the filing of this brief. Respondent has refused to consent.

AAEI is a national trade association representing over eleven hundred importers and exporters in the United States. AAEI was established in 1921 to promote fair and open trade

among nations and the protection of the international trade interests of its members. AAEI is the only national, industry-wide organization committed to representing the American international trade community. Its members include importers and exporters of a broad range of industrial and consumer goods and the organizations which serve them - freight forwarders, customs brokers, banks, law firms, countertrade specialists, export trading companies, insurance and accounting firms, shipping lines and air carriers.

The issues before the Court in this matter are of vital importance to AAEI and its members. Importers, exporters and their insurers have a significant interest in the outcome of this matter. Their ability to seek redress for damage to cargo in U.S. international trade could be seriously restricted if the lower court decision is permitted to stand. Shipowners will insert boilerplate provisions in bills of lading requiring claims adjudication in remote lands. The expense and delay caused by such unilateral requirements will substantially circumscribe cargo owners' abilities to seek redress.

The outcome of this litigation could have a significant impact on U.S. trade and the balance of payments. According to the U.S. Department of Commerce, the total value of U.S. waterborne exports in 1993 was over $176 billion. The total value of U.S. waterborne imports in 1993 was over $335 billion. U.S. importers and exporters will be significantly impacted by the outcome of this decision. Their ability to hold foreign shipowners responsible for damage to cargo in U.S. international trade as provided in the Carriage of Goods by Sea Act will be seriously restricted if the decision below stands.

AIMU was founded in 1898 and is a national trade association of over ninety insurance companies, each of which is authorized to engage in the business of marine insurance, including cargo transportation insurance, in one or more states of the United States. Because its membership underwrites

approximately ninety percent of the marine insurance written in the United States, the issues of this case are of extreme importance to AIMU and its member companies in their efforts to maintain uniformity in and consistent application of the laws affecting maritime commerce and marine insurance. An issue of very special significance to AIMU and its member companies is presented in this case. Cargo insurance plays a significant role in facilitating international trade. The premiums charged to cargo owners reflect their loss experience. Cargo insurance rates are directly influenced by the ability to seek redress from shipowners for damage to cargo.

Importers, exporters and their insurers must not be denied the rights granted to them by Congress in the Carriage of Goods by Sea Act. The narrowing of their right to assert claims pursuant to that statute will have a deleterious effect on U.S. trade.

AAEI and AIMU respectfully pray that this Honorable Court accept their brief *amicus curiae*.

Respectfully submitted,

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January 12, 1995

IN THE

Supreme Court of the United States

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—v.—

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BRIEF OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

SUMMARY OF ARGUMENT

The fundamental policies underlying both the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* (1988), and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1988), are undermined by the decision of the court below. The FAA was intended to encourage enforcement of mutually agreed arbitration contracts, not to coerce parties into arbitration in remote lands.

The court below misconstrued the policy favoring enforcement of mutually agreed arbitration agreements. The instant

form bill of lading—a contract of adhesion—must be construed against Respondents. The unilaterally imposed foreign arbitration clause cannot be used to deprive rights guaranteed to cargo interests by the Carriage of Goods by Sea Act.

All rules of statutory construction require that COGSA must continue to determine the enforceability of foreign arbitration clauses in bills of lading. The foreign arbitration clause before the Court is a *per se* violation of COGSA and may not be enforced.

ARGUMENT

I.

AN AGREEMENT TO ARBITRATE MUST BE BASED ON MUTUAL CONSENT. A CONTRACT OF ADHESION MAY NOT BE EMPLOYED BY THE COURTS TO DENY STATUTORY PROTECTIONS.

The duty to arbitrate is contractual in origin and no party can be forced into arbitration unless he has agreed to go there. *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236 (E.D. Pa. 1991); *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 793 F. Supp. 664 (W.D.N.C. 1992), *aff'd*, 984 F.2d 113 (4th Cir.), *cert. denied*, 113 S. Ct. 2930 (1993). Despite the strong federal policy in favor of arbitration, arbitration still remains a matter of contract. Parties cannot be forced to submit to arbitration a dispute which they have not agreed to arbitrate. *Lounge-A-Round v. GCM Mills, Inc.*, 166 Cal. Rptr. 920 (Ct. App. 1980); *Georgia Power Co. v. Cimarron Coal Corp.*, 526 F.2d 101, 106 (6th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976). Nevertheless, the lower court in this matter would force Petitioner to submit to arbitration in a distant land even though Petitioner never consented to arbitration. The lower court decision undermines the foundation of federal policy favoring arbitration. Arbitration must be founded upon the consent of those to be bound by the arbitration proceedings. *United States v. Pool and Canfield, Inc.*, 778 F. Supp. 1088 (W.D. Mo. 1991).

It is fundamentally unfair to distort a policy favoring enforcement of mutually agreed arbitration contracts in order to deprive parties of statutory rights when there has been no true agreement to arbitrate. But that is precisely what the lower court would do in the instant case. Petitioner is the subrogated cargo insurer of an importer and distributor of fruit in New England. The importer contracted with a Moroccan supplier for a shipment of Moroccan oranges to the United States. The oranges were shipped on board the Respondent vessel but were crushed during the transportation, apparently due to negligent storage. At the time of the shipment, the vessel owner's local agents in Morocco issued to the shipper a form bill of lading with various boilerplate provisions. There was no negotiation as to the terms of the bill of lading which was to constitute the contract of carriage between the cargo owner and the shipowner.

One of the boilerplate provisions in the form bill of lading prepared unilaterally by Respondents was the following:

> 3. **Governing Law and Arbitration**
>
> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law.
>
> (2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange Inc., in accordance with the Rules of TOMAC and any amendments thereto, and the award by the arbitrators shall be final and binding on both parties.

According to this boilerplate provision, any dispute arising from the transportation of Moroccan oranges from Agadir to New Bedford, Massachusetts on a vessel owned by a Panamanian corporation was to be arbitrated in Japan according to

Japanese law. Even the drafters of this one-sided boilerplate form realized that it would violate protections afforded to American importers under the Carriage of Goods by Sea Act. *See infra* pp. 7-8. Accordingly, a back-up provision was inserted providing that COGSA would apply if the shipowner did not succeed with his attempt to unilaterally displace the American cargo owner's COGSA rights with Japanese arbitration and law.

The court below took the unprecedented position that the Federal Arbitration Act alone applies to the question of the validity of the Japanese arbitration clause. The lower court erroneously relied upon the federal policy favoring enforcement of mutually agreed arbitration agreements to coerce cargo owners to comply with a contract of adhesion forcing arbitration in an unreasonably remote forum. Applying a flawed statutory construction analysis, the lower court cast aside the statutory protections guaranteed by COGSA to the American importer. *See infra* pp. 14-19. Instead, the FAA was held to have ousted the COGSA protections and to require enforcement of the unilaterally imposed foreign arbitration clause.

A court, when sitting in admiralty, is an equity court and must apply equitable principles to insure that justice is done between the parties. *Midland Tar Distillers, Inc. v. M/T LOTOS*, 362 F. Supp. 1311, 1315 n.5 (S.D.N.Y. 1973). Hardship or injustice should not be created by courts attempting to effectuate arbitration "agreements" which do not reflect the intent of the parties. *Id.* But that is precisely what the lower court has done. If that decision is permitted to stand, cargo interests will be forced to pursue claims against carriers in costly, remote jurisdictions because their COGSA protections have been denied, even though there has been no agreement to such arbitration.

The Circuit Courts of Appeal have uniformly held that bills of lading are contracts of adhesion which must be strictly enforced against the carrier. *Gamma-10 Plastics, Inc.*

v. American President Lines, 32 F.3d 1244 (8th Cir. 1994); *All Pacific Trading, Inc. v. Vessel M/V HANJIN YOSU*, 7 F.3d 1427 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1301 (1994); *Mitsui & Co. v. American Export Lines*, 636 F.2d 807 (2d Cir. 1981). *See also Allied Chemical Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986); *Interocean S.S. Corp. v. New Orleans Cold Storage and Warehouse Co.*, 865 F.2d 699 (5th Cir. 1989); *EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046 (3d Cir.), *cert. denied*, 114 S. Ct. 193 (1993); *Encyclopaedia Britannica, Inc. v. SS HONG KONG PRODUCER*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970); *Cabot Corp. v. S.S. MORMACSCAN*, 441 F.2d 476 (2d Cir.), *cert. denied*, 404 U.S. 855 (1971).

In its analysis, the court below improperly refused to consider the fact that the instant arbitration clause was a contract of adhesion.[1] But the question of whether the arbitration clause was mutually agreed is fundamental to a determination regarding enforcement of the arbitration agreement. Enforcement of a mutually agreed contract to arbitrate and coercive enforcement of a clause inserted unilaterally by the carrier into a contract of adhesion cannot stand on the same footing before the law.

Courts have distinguished effectively between incorporation of an arbitration clause in a bill of lading pursuant to an express agreement and incorporation of such a clause pursuant to a "form contract of adhesion." *Kaystone Chemical, Inc. v. BOW-SUN*, 1989 A.M.C. 2976, 2981-82 (S.D.N.Y. 1989). A primary consideration is whether or not the bill of lading provides adequate notice to the consignee. There also must be an express agreement providing for such foreign arbitration. In *Kaystone*, there was a specifically negotiated arbitration agreement between the parties in the charter party which was then incorporated into the bill of lading and the

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[1] The basis for this refusal is unclear. The district court opinion did address the question.

agreement was enforced. In this case, however, there was no such negotiated agreement. In fact, there was no "agreement" at all. The arbitration clause was inserted unilaterally by the shipowner and the cargo owner did not even have notice of the clause. The lower court declined to consider such analysis. The First Circuit erred when it refused to address the basic issue of mutuality of contract and notice, despite the fact that the contract of adhesion agreements were considered by the district court.

Other circuits have acknowledged this fundamental precept: contracts of adhesion should be strictly construed against the drafter. *See supra* pp. 4-5. Even where there has actually been an agreement to arbitrate, courts have protected the weaker party to the agreement from waiving certain rights guaranteed by statute. Most recently, the Ninth Circuit considered an arbitration clause in a distributorship agreement. That Court of Appeals ruled that even though a franchisee may agree to arbitration as a forum for the resolution of disputes, franchisees could not be forced to surrender rights granted to them by Congress. "Disparity of bargaining power" was a significant consideration in striking down the arbitration agreement.

> In effect, the franchisors could simply continue their earlier practice of presenting prospective franchisees with contracts of adhesion that deny them the rights and benefits afforded by Congress. In that way, the PMPA would quickly be nullified.

Graham Oil Co. v. Arco Products Co., Nos. 92-35007, 92-35380, 1994 WL 701315, at *3 (9th Cir. 1994).

In reaching its conclusion that the arbitration "agreement" should not be enforced, the Ninth Circuit also relied heavily upon the rule that contracts of adhesion must be strictly construed against the drafter. *Id.* at *4. The court looked to the presumed intent of the party that lacked the bargaining power and adopted the construction most favorable to it. *Id.* Accordingly, the distributorship franchisee's Congressionally mandated rights could not be deprived even where there was an agreement.

In the instant case, there was no agreement between the parties whatsoever regarding arbitration in a distant land. The foreign arbitration clause was inserted unilaterally into a contract of adhesion—a form bill of lading—by the carrier who had sole control over its contents. Nevertheless, the lower court in this case would permit such a unilaterally imposed clause to deprive the cargo owner of his Congressionally mandated rights under COGSA. If the lower court had adopted the analysis of the Ninth Circuit, the cargo owner, who had no notice and no opportunity to negotiate the foreign arbitration clause, would not be deprived of COGSA protections. The analysis of the Ninth Circuit with respect to enforcement of such contracts of adhesion is the proper one.

II.

COERCION OF A PARTY WHO HAS NOT AGREED TO REMOTE FOREIGN ARBITRATION VIOLATES THE PURPOSES OF BOTH THE FEDERAL ARBITRATION ACT AND THE CARRIAGE OF GOODS BY SEA ACT.

The Carriage of Goods by Sea Act was aimed at protecting cargo owners from unilaterally imposed clauses in bills of lading. Congress specifically "intended COGSA to ameliorate this very difficulty of bills of lading with one-sided form provisions." *Union Ins. Soc'y of Canton, Ltd. v. S.S. ELIKON*, 642 F.2d 721, 724 (4th Cir. 1981). In view of this policy, non-negotiated foreign arbitration clauses have been held to be contracts of adhesion which are properly governed by COGSA. *Pacific Lumber & Shipping Co. v. Star Shipping A/S*, 464 F. Supp. 1314, 1315 (W.D. Wash. 1979). The loss of statutorily protected rights under COGSA has been guarded against.

> If ocean carriers were allowed to unilaterally select the forum for the resolution of cargo claims it would be an invitation to carriers to select forums having no relationship to the ports of loading or discharge, and the carriers would be at liberty to select forums that might not fairly enforce COGSA.

Id.

The decision below flies in the face of the principles underlying COGSA. The court below admits that reduction of uncertainty with respect to the rights of shippers was one of the purposes for enactment of COGSA in 1936. The lower court stated:

> COGSA was also intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, responsibilities and rights of shippers, and liabilities of insurers.

Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER, 29 F.3d 727, 728 (1st Cir.), *cert. granted*, 115 S. Ct. 571 (1994). The lower court also agrees that COGSA applies to the instant form bill of lading as a matter of law. But, through a strained statutory construction analysis, the court below ignored the basic policies underlying COGSA. If upheld, the decision of the lower court will work directly against these stated objectives. Cargo owners will be deprived of rights granted by COGSA in 1936. Importers and exporters of goods into or from the United States will not know how or where their claims against carriers for damage to cargo in international transport should be made. Uncertainty and expense will increase substantially.

As the Second Circuit has aptly pointed out, requiring cargo interests to seek redress for damage to cargo in a distant land puts a "high hurdle" in the way of enforcing cargo interest rights. *Indussa Corp. v. S.S. RANBORG*, 377 F.2d 200 (2d Cir. 1967) (*en banc*). The Second Circuit and the Eleventh

Circuit and other courts have recognized the importance of protection of COGSA rights in the face of clauses unilaterally inserted in form bills of lading. The practical application of the lower court's opinion here will be to force lower settlements. Cargo interests will no longer continue to have the right to adjudicate their claims in a convenient forum, as guaranteed by COGSA.

Other courts have generally upheld the viability of statutorily protected rights under COGSA. The Eleventh Circuit has ruled that a foreign arbitration clause conflicts with COGSA's "implied policy that an American forum will be made available to a consignee . . . ." *State Establishment for Agric. Prod. Trading v. M/V WESERMUNDE*, 838 F.2d 1576, 1581 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988). But the First Circuit would deny such protections based on a contract of adhesion inserted unilaterally by the carrier.

The Eleventh Circuit analysis is instructive. In striking down the foreign arbitration clause, lack of notice was an important consideration to the Eleventh Circuit. At a minimum, the consignee must have actual notice of the foreign arbitration clause conflicting with COGSA rights before there can be an enforceable contract. *Id.* Actual notice of provisions that would deny him his federal statutory protections under COGSA must be given to the consignee "in order to insure a reasonable result and to prevent injustice." *Id. Compare* with the instant case, in which the consignee had no knowledge of the insertion of the arbitration clause in the form bill of lading until the oranges were delivered in a damaged condition. Requiring arbitration in Japan according to Japanese law in this case would be both unreasonable and unjust.

Another critical consideration by the Eleventh Circuit was the absence of any real negotiation between the parties regarding the arbitration provision.

> There is no evidence that the terms of the bills of lading in this case were agreed to through hard bargaining;

> rather they appear to be the form clauses of an adhesion contract.

Id. at 1582. That court struck down the form arbitration clause inserted unilaterally by the carrier because without bargaining, there was no mutual agreement. In the instant case, there was no notice, no bargaining and no agreement regarding the clause. The enforcement of the clause is improper.

The Eleventh Circuit also held that COGSA protections cannot be relinquished by implication. In order that COGSA not apply, there must be an express agreement that COGSA was not intended to apply. *Id.* at 1580. A unilaterally imposed foreign arbitration clause violates COGSA guarantees. COGSA bars the foreign arbitration clause *per se* because "contractual language requiring a consignee to litigate claims against the carrier in a foreign forum under foreign law . . . [is] ineffective because such provisions, as a practical matter, tend to lessen the liability of the carrier, particularly where the claim is small." *Id.* at 1580-81. The real effect of insertion of a clause requiring arbitration in a remote, expensive forum is to dissuade owners of damaged goods from filing claims or to force small settlements.

The analyses of the Second and Eleventh Circuits conform to considerations outlined by this Court. This Court has reviewed forum selection clauses, after considering the bargained nature of the contract, the reasonableness of the forum and the general policy of encouraging private contractual choice for dispute resolution. *Union Ins. Soc'y*, 642 F.2d at 724 (citing *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)). This Court has taken particular note when COGSA does not apply. *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 n.11 (1972). Where COGSA does apply, its statutory provisions must be given effect.

The important considerations of notice and bargaining power have led courts to strike down foreign arbitration clauses inserted into contract of adhesion bills of lading. The

practical aspects of the transactions are important. The typical ocean bill of lading transaction has been described by the courts:

> And it is very unlikely that plaintiffs, as consignees, would have had actual notice of, or have engaged in any "hard bargaining" with respect to, the foreign arbitration clause, prior to entering into the transaction with the shipper.
>
> In the typical transaction an ocean bill of lading for common carriage is a contract of adhesion. Most often, the ocean bill of lading is prepared abroad by the carrier and delivered to the shipper in exchange for the goods. The shipper then exchanges the bill of lading with a bank which had previously arranged letter of credit financing at the consignee's behest. Thus, the consignee most often does not have any access to the bill of lading before entering into its transaction with the shipper. In the typical transaction the ocean bill of lading for common carriage is a form bill, incorporating terms of COGSA, which is prepared by the carrier. The consignee does not negotiate with the shipper with respect to jurisdictional terms to be included in, or omitted from, the bill of lading. The virtue of this typical practice is that it keeps things simple and therefore ensures the efficient effectuation of international commercial transactions. Such practice is consistent with the underlying policy of COGSA . . . .

Organes Enterprises, Inc. v. M/V KHALIJ FROST, 1989 A.M.C. 1460, 1465-66 (S.D.N.Y. 1989). The economic strength and bargaining power of the parties to ocean bills of lading are not even "roughly equal." *Id.* at 1464 (citing *Siderius, Inc. v. M.V. IDA PRIMA*, 613 F. Supp. 916, 920-21 (S.D.N.Y. 1985)). That fact should be a strong factor in favor of enforcing the consignee's rights under COGSA and against coercing arbitration in a distant land.

The scope of arbitration clauses in common carrier bills of lading cannot be left solely to contractual arrangement. *Aaacon Auto Transport, Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 655 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). Such bills of lading are contracts of adhesion and statutory protections of cargo owners must be closely guarded. *Id.* In order to effectuate the underlying policy of COGSA to reduce uncertainty concerning the rights and liabilities of carriers, shippers and underwriters, a foreign arbitration clause in an ocean bill of lading is a *per se* violation of § 1303(8) of COGSA. This Court should rule that the instant clause from the carrier's form bill of lading is null and void and without effect. *See Organes Enterprises*, 1989 A.M.C. at 1466.

Enforcement of the Japanese arbitration clause inserted unilaterally into its form bill of lading by the carrier would also violate the policies underlying the FAA. Congress enacted the FAA to relieve parties of the expense and delays of litigation. *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990). But the decision of the lower court will do just the opposite. If the instant clause is enforced against the cargo owner, expense and delay are certain to result. Requiring arbitration in Japan, a forum which bears no reasonable connection to the transaction, will place an extreme hardship on Petitioner. The cost of conducting arbitration in such a distant land, especially in light of the strong yen, will be prohibitive. Arbitration in Japan saves neither time nor money. *See* Steven Passer, Comment, *Commercial Arbitration Between American and Japanese Business: A Japanese Perspective*, 39 Kan. L. Rev. 223, 228 nn.30-31 (1990).

Another preeminent concern in passing the FAA was to encourage enforcement of private arbitration agreements into which parties had entered. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). The first task of a court in analyzing arbitration clauses is to determine

whether, in fact, the parties agreed to arbitrate. *Id.* at 626. This Court has recognized "that the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)). The FAA is intended to require courts to enforce "privately negotiated agreements" to arbitrate in accordance with their terms just like any other agreement. Arbitration under the FAA is and must continue to be a matter of consent, not coersion. *Id.* at 477-78. Enforcement of the instant clause would violate this FAA underpinning.

The unreasonableness of the foreign forum is also an important consideration. When a clause in a bill of lading requires adjudication in a foreign jurisdiction, that clause will not be enforced, especially where the terms of the bill of lading are not agreed to through hard bargaining, but rather are inserted as part of form clauses of an adhesion contract. *Union Ins. Soc'y*, 642 F.2d at 724. This is particularly so when the foreign forum is unreasonable. *Id.* at 725.

The purpose of the Federal Arbitration Act was to enforce lawful agreements entered into by parties. It clearly was not to impose arbitration on parties involuntarily. *Casarotto v. Lombardi*, No. 93-488, 1994 WL 702758, at *7 (Sup. Ct. Mont. 1994) (citing *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 477-78 (1989)). The First Circuit has been criticized for its flawed analysis supporting the validity of arbitration agreements. *Id.* at *11. The lower court has been accused even of arrogance and intellectual detachment from reality. *Id.* These harsh words stem from the First Circuit's failure to consider the hardships imposed on the party that is forced to arbitrate disputes far from home.

> Nowhere in his opinion does he consider the financial hardship that contracts, like the one in this case, impose on people who simply cannot afford to enforce their rights by the process that has been forced upon them.

Id.

The notion that a consignee without notice could have knowingly and voluntarily bargained and agreed to resolve its contractual disputes by arbitration is "naive at best, and self-serving and cynical at worst." *Id.* A contract or agreement suggests mutuality, but there can be no mutuality in a contract of adhesion—such as a form bill of lading—which the consignee has absolutely no role in negotiating. The line of cases, particularly in the First Circuit, which has imposed arbitration agreements in contracts of adhesion on unsuspecting parties has been properly criticized.

> These decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up.

Id. at *12. In order to effectuate the purposes of both the FAA and COGSA, the decision below should be reversed.

III.

THE REPEAL OF COGSA PROTECTIONS FOR CARGO OWNERS FROM ABUSIVE FORM BILLS OF LADING CAN NOT BE IMPLIED FROM THE MERE RECODIFICATION OF THE FEDERAL ARBITRATION ACT.

The decision below rests upon the conviction that the Federal Arbitration Act is the only statute which governs the validity of foreign arbitration clauses. *Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER*, 29 F.3d 727, 731 (1st Cir. 1994). According to the court below, COGSA has no application to the validity of the arbitration clause despite the fact that COGSA applies **as a matter of law** to the bill of lading itself. *Id.* at 729. The lower court erred when it engaged in its contorted statutory construction analysis in order to reach the conclusion that the FAA alone applies to the instant

arbitration clause. The process by which the lower court ousted COGSA from application to the foreign arbitration clause—despite agreement that COGSA applies to the form bill of lading itself—is flawed and circuitous. The ouster of COGSA violated venerable canons of statutory construction.

A. THE COURT BELOW DISREGARDED AN IMPORTANT STATUTORY CONSTRUCTION CANON: WHEN TWO STATUTES MAY CONFLICT, A COURT MUST STRIVE TO GIVE EFFECT TO BOTH.

Courts, when confronted by arguably different conflicting statutes, must give effect to both where possible. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). In fact, courts are under a duty to construe statutes harmoniously where that can be done reasonably. 2B Norman J. Singer, *Sutherland Statutory Construction* § 53.01 at 229-30 (5th ed. 1992). But the court below made no effort to harmonize the FAA and COGSA. Instead, the recodification of the FAA was held to have removed impliedly COGSA from application over foreign arbitration clauses in bills of lading.

Recognizing this primary canon of statutory construction in another case, however, the First Circuit acknowledged that an appellate court's primary obligation is to determine if, in fact, there is a conflict between the statutes before it.

> The preferred approach to statutory construction dictates that a reviewing court first determine if the **perceived conflict** between two laws is **real**.

Sunshine Development, Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir. 1994) (emphasis added). In that case, the court correctly concluded that where statutes can be reconciled, the perceived conflict is only apparent and not real. In the instant case, however, the lower court failed to give proper consideration to this important rule of statutory construction. No attempt was made to reconcile the two statutes.

The lower court also relied upon the strong federal policy favoring arbitration as a basis for ousting COGSA application to a foreign arbitration clause in a form bill of lading. It disregarded this Court's recognition that the FAA does not require parties to arbitrate when they have not agreed to do so. *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989). The FAA "does not mandate the arbitration of all claims." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

The court below erred when it held that only the FAA must be given effect on the basis the FAA limits the allegedly prior-enacted COGSA. The court was wrong. In fact, COGSA was enacted in 1936. The FAA was enacted in 1924, not 1947, as erroneously reported in the decision below. 29 F.3d at 732.

The lower court took the position that the FAA recodification in 1947 impliedly repealed the protections granted to cargo owners under COGSA. But an intent to repeal can only be implied from an irreconcilable conflict between enactments. *United States v. King*, 824 F.2d 313 (4th Cir. 1987).

B. A REPEAL OF COGSA, ENACTED IN 1936, CANNOT BE IMPLIED FROM ENACTMENT OF THE FAA IN 1925 OR ITS RECODIFICATION IN 1947.

Courts are reluctant to find repeal by implication. Even where two statutes conflict somewhat, a court is under a duty to give effect to both, unless the text of the latter statute or its legislative history shows that Congress specifically intended to repeal the earlier statutory provision and simply failed to do so expressly. *United States v. Barrett*, 837 F.2d 933 (10th Cir. 1988). Here, the legislative history of the recodification of the FAA in 1947 shows the opposite intent. **No material change** was intended. H.R. Rep. No. 255, 80th Cong., 1st Sess. at 1515 (1947). It is impossible that the FAA recodification ousted provisions in COGSA.

The FAA was enacted in 1925 as Public Law 68-401, eleven years before enactment of COGSA. In 1947, however, as part of a series of enactments to adopt the various titles of the United States Code into "positive law," Title 9 of the United States Code was itself enacted. Prior to that time, it was only the Statutes at Large which had actually been enacted. Confirming that the recodification could not be interpreted to change the law, the House Committee on the Judiciary stated the following:

> This bill takes each section of title 9 of the United States Code, 1940 edition as of January 2, 1947, and **without any material change** enacts each section into positive law. No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill.

H.R. Rep. No. 255 at 1515 (emphasis added). Title 9 of the Code had not been enacted into positive law prior to 1947. That meant that one had to consult the appropriate volume of the United States Statutes at Large to be certain of the content of the Code. *See Richey v. Indiana Dept. of State Revenue*, 634 N.E.2d 1375 (T.C. Ind. 1994); 1 U.S.C. § 204(a) (1988). Enactment into positive law means only "law actually and specifically enacted or adopted." *Black's Law Dictionary* 1162 (6th ed. 1990). Prior to 1947, the FAA, as recorded in the Statutes at Large, was the only positive law provision. The 1947 recodification was part of a series of bills intended to enact all titles of the United States Code as positive law. *See* H.R. Rep. No. 251, 80th Cong., 1st Sess. (1947). The lower court has erroneously attempted to bootstrap this recodification into a repeal of COGSA provisions. It cannot be done. No amendments to existing law were intended by the recodification. This Court has stated:

> [I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.

Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957); *see also United States v. Le Bris*, 121 U.S. 278, 280 (1887) and *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912). This is particularly so when as here no significant change in wording is made. *Logan v. United States*, 144 U.S. 263, 302 (1892). But the court below has made just such a forbidden inference. According to the decision on review here, the 1947 recodification of the FAA in Title 9 of the U.S. Code should be inferred to oust COGSA from application to a foreign arbitration clause found in a form bill of lading. But the express intent of the drafters was the opposite. No such fundamental change would be made by the revisers without express intent. *United States v. Ryder*, 110 U.S. 729, 739-40 (1884).

The lower court has turned statutory construction on its head. The legislative history of the 1947 recodification makes it clear that there was no material change intended. There was no mention of COGSA in the recodification and no reference to a repeal of protections afforded to a cargo owner under COGSA. The lower court improperly inferred such a result.

The 1925 legislative history of the FAA is itself instructive as to the enforceability of arbitration clauses in form bills of lading. Prior to the enactment of the FAA, the Joint Congressional Committee of the Judiciary held hearings on the arbitration of interstate commercial disputes. One of the specific concerns of the Joint Committee was the specter of shippers being presented with boilerplate arbitration clauses without having the power to refuse arbitration. At the hearing, the Chairman of the Joint Committee specifically inquired about form bills of lading and arbitration clauses inserted on a "take it" or "leave it" basis. The Committee was assured that the "bill of lading act" would control. That act contained the terms of the bill of lading and "that is a protection to the shipper." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committee on the Judiciary*, 68th Cong., 1st Sess. 15

(1924). Clearly, the intent of Congress was not to supersede the bill of lading statute, the precursor to COGSA (Pomerene Bills of Lading Act, 49 U.S.C. app. §§ 81-124 (1988)) in effect in 1925.

When Congress enacted COGSA in 1936, it specifically sought to protect the rights of shippers, consignees and their insurers from the overreaching powers of carriers. Shipowners were not permitted to lessen their liability by inserting disclaimers in the bill of lading. Had the lower court properly analyzed the interplay of the two statutes, it would have determined that COGSA applies *per se* to the foreign arbitration clause. COGSA, as a later enacted, more specific statute, controls the enforceability of such clauses.

The lower court's own analysis belies its own error. COGSA was enacted eleven years after the FAA. According to the lower court:

> First, a later enacted statute generally limits the scope of an earlier statute if the two laws conflict.

29 F.3d at 732. If there is any conflict between COGSA and the FAA, COGSA controls. At a minimum, the two statutes must be construed so as to give effect to both. The lower court also stated:

> Second, where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general.

Id. It is a commonplace rule "of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992). Furthermore, Congress is presumed to legislate with knowledge of the basic rules of statutory construction. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Certainly, COGSA is the more specific statute applying solely to the maritime transactions within its scope. The lower court simply misconstrued the rules of statutory construction in analyzing the effect of the two statutes.

The subsequent legislative history of the FAA also supports the proposition that a contract of adhesion form bill of lading cannot be used to coerce foreign arbitration. When the FAA was amended in 1970 to adopt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it was made even more clear that mutuality of contract in arbitration agreements is required. Under the Convention, an "agreement in writing" to arbitrate must be signed by the parties or otherwise contained in an exchange of letters or telegrams. 9 U.S.C.A. § 201 note (West Supp. 1994) (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II(2)). The FAA enacted in 1925 made reference solely to an agreement in writing to arbitrate. 9 U.S.C. § 2 (1988). The subsequent international Convention adhered to by the United States recognized the dangers of contracts of adhesion requiring arbitration without notice to a party. Now, a signature is required to constitute an agreement to arbitrate under the Convention making it all the more difficult to impose such clauses unilaterally.

This Court has frowned upon distortions of contract interpretation and statutory construction in determining the arbitrability of an issue.

> Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985). In the case of foreign arbitration clauses in ocean bills of lading, it is COGSA which must control. The decision of the lower court flies in the face of the intent of Congress in enacting the FAA and COGSA and violates the principles of statutory construction established by this Court.

CONCLUSION

It is respectfully submitted that the decision of the lower court is incorrect and should be reversed. The foreign arbitration clause is unenforceable and Petitioner's claims should be heard below.

Respectfully submitted,

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